KANDASAMY
vs.
KANDASAMY

COURT OF APPEAL,
SOMAWANSA, J. (P/CA)
WIMALACHANDRA, J.
CALA 174/2004, (LG)
DC MT. LAVINIA 2739/99/D.
MAY 20, 2005.

Civil Procedure Code, sections 24, 82, 84, 143 and 144 amended by Law, No. 20 of 1977, Section 91A – Defendant absent – Represented by an Attorney-at-

Law – Ex parte trial ? - Prepayment of costs – Failure to prepay – Consequences ? – Supreme Court Rules – Rule 46 – Certified copies not filed – Is it fatal ?

The plaintiff respondent instituted action against the 1st defendant and the 2nd defendant-petitioner seeking a judgment for divorce against the 1st defendant on the ground of adultery of the 1st defendant with the 2nd defendant-petitioner and/or on the ground of malicious desertion and for an order to pay alimony.

On the date of trial the 2nd defendant appeared in person and informed Court that her attorney at Law has revoked his proxy. Court ordered the 2nd defendant to prepay costs on or before the next date and refixed the case for further trial on 06.05.2004. The 2nd defendant petitioner signed the case record agreeing to make the payment of costs.

On the next date of trial the 2nd defendant was absent and had failed to make the prepayment of costs. However her Counsel appeared and made an application for postponement as the 2nd defendant-petitioner was absent due to unavoidable circumstances and also submitted that the 1st defendant had died, hence the action cannot be proceeded with against the 2nd defendant-petitoner.

Court overruled the objection and fixed the case for *ex-parte* trial against the 2nd defendant.

The 2nd defendant - petitioner sought leave to appeal against the said order.

HELD:

(1) In terms of section 84 and 144 the Court may fix a case for *ex-parte* trial upon the default or non appearance of the defendant, However at the trial date if the defendant does not appear but an Attorney at Law appears and acts and pleads on his behalf the defendant is deemed to have duly appeared before Court.

(2) If the court was of the view that the application made by the Counsel for the 2nd defendant should be refused the court should have proceeded with the trial *inter partes.*

Held further :

(3) There was no condition that the case would be fixed *ex-parte* if the cost was not paid on or before that next date and there was no agreement between the parties that the case would be fixed for *ex-parte* trial against

the 2nd defendant, if the costs were not prepaid. Accordingly the Court is not empowered to fix the case for *ex-parte* trial if the defendant fails to pay costs where she has not consented to such an order.

Held further :

(4) Although Rule 46 has a mandatory effect any omission can be rectified at a later stage with permission of Court. Failure to comply with the rule is curable by subsequent compliance where the Court holds that initial compliance was impossible by reason of circumstances which are beyond the control of the applicant.

Though initially certified copies were not filed the petitioner had tendered same subsequently with permission of court.

APPLICATION for leave to appeal from an order made by the District Court of Mt. Lavinia; with leave being granted.

Case referred to :

(1) De Mel Vs. Gunasekera 41 NLR 33
(2) Perumal Chetty vs. Goonetilake 1908 Bal 2
(3) Sohanlal and Another vs. Devachand, AIR 1957 Rajasthan II
(4) Isek Fernando vs. Rita Fernando and Others 1999 3 Sri LR 29
(5) Piyaseeli vs. Prematilaka 1986 1 Sri LR 47
(6) Calistus Perera vs. Nawanage 1994 3 Sri LR 305
(7) Francis Wanigaratne Vs. Pathirana 1997 3 Sri LR 231
(8) Rasheed Ali vs. Mohamed Ali 1981 2 Sri 29
(9) Kiriwantha vs. Navaratne 1990 2 Sri LR 393

Lasitha Kannuwanaarachchi for defendant-petitioner.
Sanjeewa Jayawardane for plaintiff-respondent.

Cur. adv. vult.

February 01, 2006.

WIMALACHANDRA, J.

The plaintiff-petitioner (hereinafter referred to as "the plaintiff") filed this application for leave to appeal from the order of the learned District Judge of Mount Lavinia dated 06.05.2004.

This Court granted leave on the following questions of law :

(1) Where the defendant is absent, but is represented by an Attorney-at-Law who makes an application for the adjournment of proceedings

on behalf of the party he represents and if the Court decides to refuse such application, can the Court fix the case for *ex-parte* trial against the absent party ?

(2) Where the Court allows a party's application for postponement of the trial on the condition that he shall pre-pay costs before the next trial date, has the Court got the power to fix the case for *ex-parte* trial, against that party, if he fails to pre-pay costs as ordered by Court ?

(3) Does the filing of the photocopies of the proceedings of the original case record of the District Court, which are not certified by the Registrar, but only certified by the registered Attorney-at-Law, amount to non compliance of Rule 46 of the Supreme Court Rules ?

Briefly, the facts relevant to this appeal are as follows :

The plaintiff instituted this action in the District Court of Mount Lavinia against the 1st defendant and the 2nd defendant seeking, *inter alia*, a judgment for divorce against the 1st defendant on the ground of adultery of the 1st defendant with the 2nd defendant and/or on the ground of malicious desertion by the 1st defendant, for an order directing the 1st defendant to pay permanent alimony in a sum of Rs. 5 million to the plaintiff and also for an order directing the 2nd defendant to pay a sum of Rs. 5 million as damages to the plaintiff. When the case came up for trial on 12.01.2004, the 2nd defendant appeared in person and informed Court that her Attorney-at-Law has revoked his proxy. The learned District Judge ordered the 2nd defendant to pre-pay costs of Rs. 5,000/- to the plaintiff on or before the next date of trial and re-fixed the case for further trial on 06.05.2004. The 2nd defendant signed the case record agreeing to make the payment of costs on or before 06.05.2004, which was the next date fixed for the commencement of the trial. On the next date of trial, the 2nd defendant was not present in Court and failed to make the pre-payment of costs as directed by Court. Her counsel however appeared in Court, and made an application for postponement as the 2nd defendant was absent due to an unavoidable circumstance and also submitted that the 1st defendant has died, hence the action cannot proceed against the 2nd defendant. The learned District Judge overruled this objection and fixed the case for *ex-parte* trial against the 2nd defendant. It is against this order that the 2nd defendant has filed this appeal.

I will now consider the first question for determination. When the case was taken up for trial on 06.05.2004, the 2nd defendant was absent and the Attorney-at-Law for the 2nd defendant moved for a postponement. However, the learned judge refused this application and fixed the case for *ex-parte* trial.

The Court can fix a case for *ex-parte* trial either under section 84 or section 144 of the Civil Procedure Code.

Section 84 of the Civil Procedure Code reads as follows :

> **"If the defendant fails to file his answer on or before the day fixed for the filing of the answer, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed for the hearing of the action, and if the court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the court shall proceed to hear the case *ex-parte* forthwith, or on such other day as the court may fix."**

Section 144 of the Civil Procedure Code reads as follows :

> **"If on any day to which the hearing of the action is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the action in one of the modes directed in that behalf by chapter XII, or make such other order as it thinks fit."**

Section 24 of the Civil Procedure Code permits a party to make any appearance or application in Court by an Attorney-at-Law.

The question that arises is whether the trial judge had followd the correct procedure when the Attorney-at-Law for the 2nd defendant appeared in Court and moved for a postponement. A party is entitled to decide whether

he should be present in Court or be legally represented in Court in terms of section 24 of the Civil Procedure Code. In the case of *De Mel Vs. Gunasekera*[1] it was held that if an advocate appeared and moved for a postponement then the proceedings should be considered as *inter-partes*, In *Perumal Chetty Vs. Goonetilleke*[2] the Supreme Court observed that there is no requirement for the defendant to appear personally and it is sufficient if he is represented by his proctor.

In terms of section 54 and section 144, the Court may fix a case for *ex-parte* trial upon the default or non appearance of the defendant. However, on the trial date if the defendant does not appear but an Attorney-at-Law appears on his behalf and acts and pleads on his behalf, the defendant is deemed to have duly appeared before Court.

When sections 84 and 144 of the Civil Procedure Code are read with section 24 of the Code, it appears that it is not necessary for a defendant to be present in person, but he is deemed to have duly appeared before Court when he is represented by the registered Attorney-at-Law or an Attorney-at-Law on the instructions of his registered Attorney-at-Law.

The Indian Civil Procedure Code has identical provisions. (Order III Rule 1 of the Indian Civil Procedure) in the Indian case of *Sohanlal and Another Vs. Devachand*[3] Modi, J. held that the presence of counsel for a party is equivalent to that of the party himself according to the scheme envisaged in our Civil Procedure Code subject to the limitation, namely, where counsel for a party pleads no instructions to Court, his mere physical presence is of no avail.

At 15 Modi, J. made the following observations :

> **"A party when he has engaged counsel by a proper writing and has briefed him for the case, the latter is perfectly competent in law to represent the party in Court and act and plead on his behalf and the personal appearance of the party is not necessary and cannot be insisted upon unless by virtue of a specific provision of law the Court calls upon the party to appear personally.....**
>
> **We are further of opinion that the party concerned whether he be plaintiff or defendant or appellant or respondent who has already arranged for his due**

representation in Court through a duly instructed pleader, need not be called upon also to assign sufficient reason for his own absence at the hearing, the reason being that the party has made all reasonable arrangements for his representation in Court, and he should not stand to be penalised for his own absence in such circumstances."

In these circumstances, I am inclined to agree with the submission made by the learned Counsel for the 2nd defendant that the appearance of the registered Attorney or the counsel on the trial date constitutes a valid appearance on behalf of the particular party, and in such circumstances the Court cannot fix the case for *ex-parte* trial as it was done in the case before us.

In the instant case, when the case was taken up for trial on 06.05.2004 the 2nd defendant was absent and his counsel moved for a postponement, However, the learned trial judge refused the application made by the counsel for the 2nd defendant and fixed the case for *ex-parte* trial due to the non-appearance of the 2nd defendant.

The learned judge in her order has stated as follows :

"පැමිණිල්ලෙන් 2 වන විත්තිකාරයට එරෙහිව ඉදිරිපත් කර ඇති නඩු තීමිත්ත අවසන් වී නොමැත. එබැවින් අද දින 2 වන විත්තිකාරයට එරෙහිව නඩු විභාගයට අද දිනට නියම කර ඇත. නමුත් ඇය අද දින පෙනී නොසිටී. ඒ අනුව මෙම නඩුව ඒක පාක්ෂිකව විභාගයට ගනිමි.

In my opinion, if the learned judge was of the view that the application made by the counsel for the 2nd defendant should be refused, the learned judge should have directed to proceed with the trial *inter-partes*.

In the case of *Isek Fernando Vs. Rita Fernando and Another*[4] it was held that :

(1) Perusal of Section 24 of the Civil Procedure Code demonstrates the fact that an appearance of a party may be by an Attorney-at-Law. When a client requests an Attorney-at-Law to make an application it is an application the Attorney-at-Law makes on behalf of the party he represents for the due administration of justice.

(2) When Court decides to refuse an application made by counsel for the adjournment of proceedings the Court

has only one option-inform the counsel that he should proceed with the trial *inter-partes.*

(3) Appearance may be by the party in person or by his counsel or his registered Attorney, and where the defendant is absent but is represented by counsel or by Attorney-at-Law and the Court is satisfied on the evidence adduced by the plaintiff, Court must enter a final judgment and not an order *Nisi.* Judgment must be considered as being pronounced *inter partes* and not *ex-parte.*

(4) The trial Judge erred in law by deciding to hold an *ex-parte* trial offending section 84 read with section 24 of the Civil Procedure Code.

Justice Jayasinghe who delivered the judgment is this case at 33 made the following observations :

"When a client requests an Attorney-at-Law to make an application it is an application the Attorney-at-Law makes on behalf of the party he represents for the due administration of justice. Court will disallow an application only upon being satisfied that the application is not tenable in the circumstances. This is discretionary and must be founded on sound reasoning. When court decides to refuse an application made by counsel for the adjournment of proceedings the Court has only one option. Inform the counsel that he should proceed with the trial. If he decides to allow the application he can make good the inconvenience caused to the other party by the payment of appropriate costs. If the judge decides to refuse the application then he is left with no option but to proceed with the trial as *inter-partes*."

In these circumstances, the learned Judge erred in law by fixing the case for *ex-parte* trial without following the correct procedure which would have been either to allow the application made by the counsel for the 2nd defendant or to refuse the application and direct to proceed with the case *inter-partes.*

Accordingly the order made by the Judge fixing the case for *ex-parte* trial is set aside.

With regard to the second question for determination, the learned counsel for the plaintiff submitted that the 2nd defendant has signed the case record agreeing to the order of prepayment of costs and thereby waived the right to be heard if she defaulted in the payments of the said costs as directed and agreed upon.

The relevant part of the journal entry No. 45 dated 12.01.2004 reads thus :

"කා. ස. (42) අනුව විභාගය.....

2වන විත්ති වෙනුවෙන් පෙරකලාසිය අවලංගු කරයි.

2 වන විත්තිකාරිය විසින් පැමිණිල්ලට රු. 5,000 පූර්ව ගාස්තු ගෙවිය යුතු ය."

It appears from the above mentioned journal entry that the 2nd defendant's registered Attorney-at-Law has revoked the proxy and there was no legal representation for the 2nd defendant. The Court has the power in terms of section 84, 91A and 143 to grant a postponement in such an event. When such postponement are granted, the court can order costs for the opposing parties and can also impose terms. It is to be observed that the Court has not imposed conditions, in the instant case such as that the case would be fixed for *ex-parte* trial if the costs ordered by the Court is not paid on or before the next date of trial. More over such conditions are imposed with the consent of the parties.

It was held in the case of *Piyaseeli vs. Prematilleke*[5] that, "an order that the action would be dismissed if the plaintiff failed to pay nominated costs before a fixed date and time if made without consent of the parties does not entitle the Court to dismiss the action where such costs are not paid as stipulated."

In the case of *Calistus Perera Vs. Nawanage*[6] the Supreme Court considered whether a trial judge who allows a party's application for a postponement of the trial, on the terms that he shall pre-pay costs before the next date of trial, has the power to make and implement an order that judgment will be entered against him if he fails to pay those costs, even where he has not consented to such order. Justice Mark Fernando after analysing the relevant sections 82, 91A and 143 of the Civil Procedure

Code and after considering all the relevant authorities held that ; sections 82 and 143 of the Civil Proceduere Code confer only a judicial discretion and the scope of that discretion-even if seemingly unfettered - is limited by the purpose for which it was conferred ; to compensate for the expense, delay and inconvenience occasioned by the postponement ; but not to affect the substantive rights of the parties in the subject matter of the litigation. Section 91A introduced by Law No. 20 of 1977 does not grant, even by implication, a power to the Court to dispense with adjudication. The section is a general provision intended to deal with various acts and steps in the proceedings. It was further held :

> "Nowhere does the Code confer on a judge the power to give judgment against a party merely because he fails to pay costs without an adjudication on the merits because adjudication is the essence of judicial duty, the purpose for which courts exist.
>
> Where the court allows a party's application for a postponement of the trial on the terms that he shall pre-pay costs before the next trial date, the court has no power to implement an order that judgment will be entered against him if he fails to pay those costs where he has not consented to such order."

The learned counsel for the plaintiff relied on the case of *Francis Wanigasekera Vs. Pathirana*[7] for his contention that an agreement to pre-pay costs on or before a particular date and the signing of the case record, it becomes incumbent on the party signing the case record, to duly pay the same, or to suffer the necessary consequences of forfeiting the right to be heard. The learned counsel submitted that it was perfectly justified in law for the learned Judge to fix the case for *ex-parte* trial upon the 2nd defendant failing to pay the costs, as undertaken by her.

The facts in *Francis Wanigasekera's* case (supra) are different from the facts in the case before us. In that case the 2nd defendant-appellant agreed to the prepayment order.

However, in the instant case there was no condition that the case would be fixed *ex-parte* if the cost was not paid on or before the next date, and there was no agreement between the parties that the case would be fixed

for *ex-parte* trial against the 2nd defendant if the costs were not pre-paid. Accordingly, the Court is not empowered to fix the case for *ex-parte* trial if the defendant fails to pay costs where she has not consented to such an order.

In any event the law with regard to this question has been now settled by the decision in the Supreme Court case of *Calistus Perera vs. Nawanage* (Supra) where it was held that the trial judge had no jurisdiction to give judgment for the plaintiff merely because the defendant has failed to pre-pay the costs ordered without the defendant's consent.

In the circumstances, I am of the view that the learned District Judge erred in law when she decided to fix the case for *ex-parte* trial as against the 2nd defendant for non-payment of prepaid costs.

The next question for decision in this appeal is whether the filing of photocopies of the proceedings of the original case record of the District Court which are not certified by the Registrar, but only certified by the registered Attorney-at-Law amounts to non-compliance of Rule 46 of the Supreme Court Rules.

Rule 46 of the Supreme Court Rules is identical to Rule 3 of the Court of Appeal (Appellate Procedure) Rules 1990.

The learned counsel for the plaintiff submitted that the documents marked P1, P4, P5, P6 and P10, which are annexed to the 2nd defendant's application, are not duly certified copies certified by the Registrar of the District Court of Mount Lavinia.

The learned counsel for the 2nd defendant submitted that the 2nd defendant did not receive the certified copies although she applied for the same. An application for leave to appeal has to be filed within 15 days of the impugned order. Therefore it often happens that the parties may not be able to obtain certified copies of the documents, may be due to administrative difficulties, to be filed along with the application. It is to be noted that the 2nd defendant had sought the permission of Court to tender the certified copies as soon as they were made available to the 2nd defendant. (Vide paragraph 14 of the petition). The 2nd defendant subsequently obtained the certified copies and made them available to Court when the matter was supported on 31.05.2004. It is to be observed that he had filed a motion on 28.05.2004 and tendered to the Registry the certified copies of the documents marked as P2, P3, P7, P8, P9 and P 10.

It was held in the case of *Rasheed Ali Vs. Mohamed Ali* [8] that the Court does not expect a person to do the impossible and in a situation where the parties are left no time to obtain documents as required by Rule 46.in view of the great urgency of the matter the Court may permit the petitioner to comply with the requirement subsequent to filing of the petition. Although the Rule 46 has a mandatory effect any omission can be rectified at a later stage with permission of Court.

In the instant case the 2nd defendant mentioned in her petition that due to reasons beyond her control certified copies could not be obtained in time and hence sought the permission of Court to tender them subsequently.

In the case of *Kiriwantha Vs. Navaratne*[9] the Supreme Court held that "a failure to comply with the rule is curable by subsequent compliance where the Court holds that initial compliance was impossible by reason of circumstances which are beyond the control of the applicant." Mark Fernando, J. who delivered the judgment made the following observations:

> **"The weight of authority thus favours the view that while all these rules (Rules 46,47,49.35) must be complied with the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as excuse or explanation therefor, in the context of the object of the particular Rule."**

In the circumstances, the 2nd defendant is not guilty of non compliance with Rule 3(1) of the Court of Appeal Rules and there is no irregularity which would disable the 2nd defendant from maintaining this application.

For these reasons I have given I allow the appeal and set aside the order of the learned District Judge dated 06.05.2004. The 2nd defendant is entitled to a sum of Rs. 10,000 as costs of this appeal.

ANDREW SOMAWANSA, J. (P/CA) — *I agree.*

Appeal allowed.